IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1125

RONALD R. SILVERTON, Petitioner,

vs.

CALIFORNIA ADULT AUTHORITY, Respondent.

Crim

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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February 6, 1976

SUBJECT INDEX

APPENDIX INDEX

Continuation of APPENDIX INDEX

TABLE OF CASES, STATUTES, AND MISC.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975
No._____

RONALD R. SILVERTON, Petitioner,

vs.

CALIFORNIA ADULT AUTHORITY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Ronald R. Silverton respectfully prays that a writ of certiori issue to review the order of the Court of Appeals for the Ninth Circuit, denying a certificate of probable cause for appeal from a judgment of the district court dismissing a petition for writ of habeas corpus.

ORDER BELOW

The order of the Court of Appeals for the Ninth Circuit, denying a certificate of probable cause, appears as number "1" in the Appendix hereto. The order rendered by the District Court for the Central District of California,

denying a certificate of probable cause, appears as number "2" in the Appendix hereto. The District Courts judgment denying petitioner's Petition for Writ of Habeas Corpus appears as number "3" in the Appendix hereto. The Report and Recommendation of the United States Magistrate appears as number "4" in the Appendix hereto.

JURISDICTION

The order of the Court of Appeals for the Ninth Circuit was entered on November 11, 1975. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Court of Appeals has sanctioned a departure from the accepted and usual course of judicial proceedings such as to call for an exercise of the Supreme Court's power of supervision?

PROVISIONS OF LAW INVOLVED

1) The holding of Moore v Dempsey (1923) 261 US 86, 43 S Ct 265, 67 LEd 543: It is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the constitution.

2) 28 U.S.C. §2254. Federal Rules of Appellate Procedure §22b: Each provides when a "certificate of probable cause" comes into play.

STATEMENT OF THE CASE

Petitioner, a 44 year old attorney admitted to practice in the State of California in 1958, and practicing continuously therein until January 28, 1972, was convicted in 1972 of the crimes of criminal conspiracy (California Penal Code §§182.1 & 182.4) and solicitation of a crime (Penal Code §653f).

At the time of his conviction, Petitioner was the sole owner of a law firm employing 65 persons. His reputation in the field of law was good. He had been commended by the California Legislature and by the County of Los Angeles Board of Supervisors. He had just prior to January 1972 announced that he was going to run for District Attorney of Los Angeles County. (Transcript of testimony before the Local Administrative Committee of the California State Bar, hereinafter abbreviated as "a/t",which is on file before this court "In The Matter of Disbarment of Ronald Robert Silverton - D-55", at page 106, lines 25-28; and page 98, lines 5-9.)

Mr. Rooker, an investigator for the Los Angeles District Attorney's Office, in an effort to get something on Silverton (petitioner herein) despite what the actual facts might be (a/t: page 115, line 22 - page 116, line 5; The Preliminary Hearing Transcript, hereinafter referred to as "p/t", which is currently lodged with the California Supreme Court, at page 92, fifth sentence from bottom of the page - bottom of the page.), barged

into Silverton's office and said to Silverton words to the effect, "Well, I'm not hurt but I was in an accident, and my car was severly damaged." Silverton said to him, "if you are not hurt I don't want the case. Sometimes, however, people don't know whether they are hurt, and perhaps you should be examined." During this time - not more than five minutes - Silverton had many phone calls, a client inthe office, and was signing different things. (a/t: page 95, lines 1 - 11; p/t: page 44, lines 5 - 21).

Based on mere association, Silverton had ascribed to him the acts of his "co-conspirators", Betty Rose in informing Rooker that Silverton would aid him in recovery of money from his auto accident without being injured; and Dr. Gerard Stavish who examined Rooker twice though Rooker said that he wasn't injured. Each of these "co-conspirators testified before the Local Administrative Committee of the California State Bar, and under oath denied that Silverton had any involvement at all with them or either of them, in connection with their activities with Rooker. (a/t: pages 40 - 63, for the testimony of Dr. Stavish; pages 63 - 76, for the testimony of Betty Rose.)

On April 11, 1972, Silverton appealed from the judgment of conviction. On October 31, 1972, Silverton's judgment of conviction was affirmed by the Court of Appeal Second Appellate District, State of California. (This unpublished opinion is on file with the California Supreme Court.)

Silverton thereafter appealed the judgment of conviction to the Supreme Court of the United States. This court on May 21, 1973 dismissed the appeal on the jurisdictional statement for want of a substantial federal question. (1973, 412 U.S. 901; reh'g denied - 1973 - 94 S. Ct. 39).

On September 26, 1973 the Superior Court of the State of California, in and for the County of Sacramento in proceeding number 43317 "In the Matter of the Application of Ronald R. Silverton for a Writ of Habeas Corpus" ordered that the Los Angeles Superior Court give to Silverton an evidentiary hearing on the grounds in Silverton's Application, which were:

1. In arriving at his judgment that Silverton was guilty, Judge Willam A. Caldecott, the trial judge to whom the matter of Silverton's guilt or innocence was submitted, considered contentions brought to his attention outside of the courtroom and outside of the presence of Silverton and his advisory counsel. The nature of these contentions were unknown to Silverton or his advisory counsel, and were of a nature opposite to Silverton's protestations of innocence with regard to the charges to be considered by Judge Caldecott.

2. Silverton waived his right to a jury trial, and waived his right to confront the witnesses against him, and agreed to submit the matter of his guilt or innocence to the trier of fact, Judge

William A. Caldecott, on the facts as set forth in the transcript of the preliminary hearing because Silverton believed that he had received from his advisory counsel, Sharon Freis, an accurate account of the remarks attributed to Judge Caldecott by Attorney Freis. These remarks were (unbeknownst to Silverton) made in Judge Caldecott's chambers, not on the record, in a private interview between only Judge Caldecott and Attorney Sharon Freis, while the latter was acting in her capacity as advisory counsel for Silverton. These remarks took place during, or immediately after the consideration by Judge Caldecott of Silverton's motion to dismiss the information on the grounds that the facts shown in the Preliminary Transcript were not sufficient to show even a reasonable "suspicion" that Silverton was guilty of the offenses charged. Silverton did not consent to said private interview, nor did he have any prior knowledge thereof, though he was in propria persona.

During this interview Judge Caldecott made statements to Mrs. Freis which she reasonably construed as an expression of an opinion on the case which was before him, ie: as to whether or not the Preliminary Transcript showed Silverton to be guilty. When Mrs. Freis relayed these statements to Silverton and to Silverton's other advisory counsel, Robert Harris, these statements did reasonably induce Silverton to waive a jury trial and his right to confront witnesses against him, and to submit the matter of his guilt or innocence to

Judge Caldecott on the transcript of the Preliminary Hearing. These statements incorrectly prognosed the opinion of Judge Caldecott on Silverton's guilt.

An evidentiary hearing was held on the afore-expressed contentions of Silverton, in the Los Angeles Superior Court on January 9, 10, and 11th of 1974; Los Angeles County Superior Court Case number 2-A 281235. At that hearing Silverton's diligence in presenting his grounds of collateral attack,based on his recent discovery of them,was stipulated to by the Attorney for the Respondent therein, the Los Angeles County District Attorney. (Page 111, lines 1 - 10 of the transcript of the evidentiary hearing; copies of which are lodged with the Clerk of the California Supreme Court and with the United States Federal District Court, for the Central District of California, in the latter court as exhibit "D" to the Petition for Writ of Habeas Corpus filed therein (Case No. CV 74-1636 MML(T)).

The Los Angeles County Superior Court, after the evidentiary hearing, denied petitioner's Petition for Writ of Habeas Corpus filed therein. On March 8, 1974 a timely Petition for Writ of Habeas Corpus was filed in the Court of Appeal of the State of California, Second Appellate District -2d Crim No. 24943, on the same grounds raised in previous petition which resulted in the evidentiary hearing aforementioned; and in addition raised the following five grounds:

1 & 2: That the fact finding

procedure employed by the State of California in the evidentiary hearing was not adequate to afford a full and fair hearing because:

1. The Los Angeles Superior Court denied Silverton's motion for discovery, timely and properly made for information that would have been helpful to Silverton at the evidentiary hearing; while permitting to the District Attorney, who represented Respondent at the evidentiary hearing, discovery, over the proper and timely objection of Silverton.

2. Denial by the Los Angeles Superior Court, the Honorable James Kolts, Judge presiding, of Silverton's motion to disqualify said Judge James Kolts under the authority of California Code of Civil Procedure §170(5) (a copy of this statute appears as exhibit number "5" in the Appendix hereto) from sitting as the trier of fact at the evidentiary hearing granted by the Sacramento Superior Court. This erroneous denial denied Silverton the same protection of California Code of Civil Procedure §170(5) permitted all other persons using the California Superior Court; and compelled Silverton to use the single summary challenge permitted under California Code of Civil Procedure §170.6 (a copy of this statute appears as exhibit number "6" in the Appendix hereto) to disqualify Judge James Kolts from sitting as the trier of fact at the evidentiary hearing. This use of the single summary challenge precluded Silverton the option of its use to disqualify the Honorable C. A. Bauer,

Judge assigned by the Los Angeles County Presiding Judge to hear the evidentiary hearing, and who did in fact hear it.

3 & 4 & 5: The Los Angeles Superior Court holding the evidentiary hearing failed to provide a fair hearing because:

3. The Court denied at the evidentiary hearing Silverton's request to introduce evidence of the results of polygraph examinations of crucial witness Steven L. Dobbs (an Attorney who testified that Judge Caldecott told him words to the effect that he "had to find Silverton guilty because he received so much pressure to do so [from outside the courtroom]"). At the time of this request the reliability of the polygraph in general, and its reliability in the specific examination of Mr. Dobbs was uncontradictedly demonstrated in Silverton's offer of proof. This offer of proof, which the court denied, included an offer to the court to submit the witness Dobbs to an examination by polygraph by any competant polygraph operator chosen by the court or respondent; the results of said examination would be entered into evidence; and that the cost of said examination would be borne by Silverton. (Transcript of the evidentiary hearing, page 170, line 11 - page 192, line 16).

4. The Court denied at the evidentiary hearing Silverton's request to introduce into evidence the testimony of Betty Rose and Dr. Gerard Stavish (the two "co-conspirators" whose conduct as ascribed to Silverton was the basis of Silverton's conviction). Silverton's

offer of proof was made that each of the "co-conspirators" would testify to the effect that each had notified Silverton just prior to his submission of the matter on the transcript, that each would testify truchfully on the witness stand,if the matter went to trial, that Silverton had no involvement with either of them with regard to the conduct constituting the basis of the prosecution. (Transcript of the evidentiary hearing, page 93, line 12 - page 102, line 26).

5. Flagrant, calculated misconduct on the part of respondent's counsel, the Los Angeles County District Attorney, which undoubtedly prejudiced the trier of fact at the evidentiary hearing against Silverton. Over the objection of Silverton, the counsel for respondent in bad faith asked a most scurrilous series of questions to a character witness for Silverton (a California Superior Court Judge). These questions impugned the ethics, honesty, and integrity of Silverton. Respondent's counsel, the District Attorney, later withdrew the questions and apologized to Silverton, admitting that he knew better than to ask questions that he was not prepared to prove up the answers to. However, this apology before the court contained inferences of the bad character of Silverton, and was itself designed to taint the trier of fact. (Transcript of evidentiary hearing pages: 201, lines 13 - 24; 194, line 5 - page 207, line 8; 201, lines 13 - 24).

On April 3, 1974 the California Court of Appeal denied the Petition for

Writ of Habeas Corpus. On April 3, 1974 a Petition for Hearing on this denial was filed with the California Supreme Court, it was denied on May 1, 1974.

On June 12, 1974 Silverton filed a Petition for Writ of Habeas Corpus in the United States District Court, Central District of California - Case Number CV 74-1636-MML(T). This petition contained each and all of the contentions set forth in the aforementioned Petition for Writ of Habeas Corpus filed with the California Court of Appeals. It was denied on March 31, 1975 by a judgment that adopted as its reasons the Report and Recommendation of the Magistrate (said judgment is exhibit "3" in the Appendix hereto, and the Report and Recommendation of the Magistrate appears as exhibit "4" in the Appendix hereto). On April 16, 1975 Silverton applied to the Federal District Court for a Certificate of Probable Cause, so that he could appeal the judgment of March 31, 1975 denying his afore-stated petition. The application was denied on August 21, 1975 by an order of the Federal District Court (which order appears as exhibit "2" in the Appendix hereto) which gave as its reasons for denial as follows: "for the reasons set forth in the Report and Recommendation of the United States Magistrate". This was the same Report and Recommendation which the court cited for its denial of the Petition itself. On September 17, 1975 a Request for Issuance of a Certificate of Probable Cause was made to the Judges of the United States Court of Appeals for the Ninth Circuit pursuant to Federal Rule of

of Appellate Procedure Number 22(b), so that an appeal could be taken from the afore-mentioned judgment of March 31, 1975, denying Silverton's Petition for Writ of Habeas Corpus. On November 11, 1975 the United States Court of Appeals for the Ninth Circuit, denied petitioner's request for said Certificate of Probable Cause, citing as its reason that the petition was "legally frivolous for the same reasons expressed by the District Court".

The order of the United States District Court denying petitioner's application for a Certificate of Probable Cause, contained two obvious errors,which the United States Magistrate, acting without benefit of the Court corrected. (Said order of correction appears as exhibit number "7" in the Appendix hereto):

First: the Court erroneously designated the capacity of petitioner as "in forma pauperis".

Second: the Court Referred to a Report and Recommendation of the United States Magistrate, which was not sent, or filed along with the Order.

REASONS FOR GRANTING THE WRIT

1. The United States Court of Appeals for the Ninth Circuit abdicated its appellate responsibility by allotting too great a weight to the Report and Recommendation of the United States Magistrate. This Report and Recommendation was the sole reason given by the

United States District Court for its judgment denying petitioner's Petition for Writ of Habeas Corpus; and was the sole reason given in its order denying petitioner's application for a certificate of probable cause to appeal said judgment; and was the sole reason given by the United States Court of Appeals in refusing petitioner's application to it for a certificate of probable cause to appeal said judgment of the United States District Court.

2. The Petition for Writ of Habeas Corpus filed by petitioner with the Federal District Court clearly shows therein:

a) That petitioner was innocent of the crime of which the State Tribunal convicted him.

b) That the original tribunal, the Judge of the State Court, was so influenced by matters outside the evidence and the courtroom that the petitioner did not receive the kind of trial that the United States Constitution guarantees.

c) That the claim of petitioner that his constitutional guarantees have been violated are based on facts outside the record and only collateral attack on the State judgment can vindicate the claim.

d) That the procedure the State provided in the habeas corpus evidentiary hearing on the above three contentions was not sufficient to reliably find the

relevant facts.

The decision of Jones v Cunningham (1963) 371 US 236, 83 S Ct 333, 9 LEd 2d 285, 92 ALR2d 675, holds that state prisoners free on parole are in "custody" and can challenge the validity of their conviction. This decision has been amplified by the holding in Carafas v LaVallee (1968) 391 US 234, 88 S Ct 1556, 20 LEd2d 554: that the expiration of a prisoners sentence does not moot a habeas corpus case commenced before release because the judgment of conviction carries with it continuing collateral consequences.

In the instant case petitioner was on July 3, 1976 disbarred by the California Supreme Court solely because of the conviction which is here attacked. This disbarment was the sole reason for the order of January 19, 1976 of this Honorable United States Supreme Court disbarring the petitioner herein from practicing law before it.

CONCLUSION

This Honorable Court should perform its "perhaps most exalted function" (Moore v Dempsey [supra]) and issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit, denying a certificate of probable cause to petitioner for appeal from a judgment of the United States District Court dismissing a Petition for Writ of Habeas Corpus.

Respectfully submitted,

Ronald R. Silverton

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February 3, 1976

Separate

APPENDIX--See Subject Index
for pagination

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1125

RONALD R. SILVERTON, Petitioner,

vs.

CALIFORNIA ADULT AUTHORITY, Respondent.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

filed on February 9, 1976

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1125

RONALD R. SILVERTON, Petitioner,

vs.

CALIFORNIA ADULT AUTHORITY, Respondent.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

filed on February 9, 1976

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APPENDIX INDEX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 11 1975

EMIL E. MELEI, JR. / CLERK
U. S. COURT OF APPEALS

RONALD R. SILVERTON,

Petitioner-Appellant,

vs

CALIFORNIA ADULT AUTHORITY,

Respondent-Appellee.

CA No. 75-8390
DC # CV 74-1636 MML (T)

O R D E R

Petitioner, a paroled California state prisoner, seeks a certificate of probable cause for appeal from a judgment of the district court dismissing a petition for a writ of habeas corpus.

The application is denied as legally frivolous for the reasons expressed by the district court.

Richard H. Chambers

Albert C. Goodwin

United States Circuit Judges

AP-1

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RONALD R. SILVERTON,

Petitioner,

v.

CALIFORNIA ADULT AUTHORITY,

Respondent.

Case No. CV-74-1636-MML(T)

ORDER DENYING APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE

Pursuant to 28 U.S.C. § 636(b)(3) and 28 U.S.C. §2253, the Court has reviewed the Application for Certificate of Probable Cause and the Report and Recommendation of the United States Magistrate filed March 31, 1975 and finds that the proposed appeal from the Judgment of the Court entered on March 31, 1975 denying the Petition for Writ of Habeas Corpus is frivolous and without merit.

Pursuant to 28 U.S.C. § 1915(a), this Court certifies that the appeal is not taken in good faith for the reasons set forth in the Report and Recommendation of the United States Magistrate attached hereto as Exhibit A.

IT IS ORDERED that the Application for Certificate of Probable Cause to appeal in forma pauperis is denied.

DATED: August 1, 1975.

MALCOLM M. LUCAS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RONALD R. SILVERTON,
Petitioner,
v.
CALIFORNIA ADULT AUTHORITY,
Respondent.

Case No. CV-74-1636-MML(T)

JUDGMENT

Pursuant to 28 U.S.C. §636(b), the Court has reviewed the petition and the report and recommendation dated March 24, 1975, on file herein, and concurs with and adopts the findings and conclusions of the United States Magistrate.

IT IS ADJUDGED that the petition for writ of habeas corpus is denied.

IT IS ORDERED that the Clerk serve a copy of this judgment and of the report and recommendation of the United States Magistrate, by United States mail, on the petitioner, on the Attorney General of the State of California and on the Presiding Judge, Los Angeles Superior Court.

Dated: March 28, 1975

MALCOLM M. LUCAS
United States District Judge

AF-3

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RONALD R. SILVERTON, Petitioner, v. CALIFORNIA ADULT AUTHORITY, Respondent.	Case No. CV-74-1636-MML(T) REPORT AND RECOMMENDATION OF MAGISTRATE

This report and recommendation is submitted to the Honorable Malcolm M. Lucas, United States District Judge, pursuant to the provisions of 28 U.S.C. §636(b) and General Order No. 104-D of the United States District Court for the Central District of California.

On June 12, 1974, petitioner, on parole, filed a petition for writ of habeas corpus. At the time of the filing of the petition, petitioner was represented by counsel. Pursuant to General Order 104-D the case was referred to a Magistrate.

A return was ordered and filed. Petitioner filed a traverse.

On September 13, 1974, petitioner filed a substitution of attorneys, naming himself attorney of record. A supplemental brief was filed on August 27, 1974. Petitioner filed a supplemental traverse on October 24, 1974.

AP-4.a

The Magistrate has reviewed all of the pleadings, return, traverse, supplemental return and traverse, pertinent portions of the transcript as well as other exhibits appended to the petition, Exhibit A submitted after the filing of the traverse, Exhibits A through I attached to the return, which included the unpublished opinion of the California Court of Appeals and correspondence filed herein.

STATEMENT OF FACTS AND ISSUES PRESENTED

Petitioner seeks relief from his conviction of two counts: conspiracy to obtain money by false pretenses and to present a fraudulent insurance claim, California Penal Code §182.4; and soliciting another to commit or join in the commission of grand theft, California Penal Code §653(f). This judgment was rendered by a judge to whom the preliminary transcript had been submitted.

The petition, filed prior to the amendment of Local Rule 19(a)(1) and passage of General Order 144, presented a problem of interpretation of grounds presented, since petitioner enunciated no separate grounds for relief in his petition. However, respondent interpreted the following three grounds therefrom, which petitioner has not found objectionable in his traverse or supplement thereto which appear to state petitioner's claims:

1. When determining petitioner's guilt, the trial judge considered evidence that was not presented in open court.

2. Petitioner's jury waiver and his waiver of the right of confrontation were coerced in that the trial judge told his counsel that if he were the committing magistrate, he would not have held petitioner to answer, and this information was conveyed to petitioner prior to his waiver of the above rights.

3. Petitioner was denied the right to a fair evidentiary hearing in the state court for five reasons:

(a) The Court denied petitioner's introduction of the results of a polygraph examination.

(b) The Court denied petitioner's request to call his co-conspirators of the above charges as witnesses.

(c) The prosecutor engaged in misconduct.

(d) The Court denied petitioner's request for depositions of witnesses; and

(e) The Court should have disqualified itself because of bias.

ANALYSIS OF THE ISSUES PRESENTED

I

At the onset, one must address respondent's argument that petitioner has not exhausted his state remedies.

Petitioner raised the above-mentioned contentions before the California Supreme Court in his petition for hearing on his habeas corpus petition (Petition, p.9) and on his petition for hearing from the denial by the California Court of Appeal, of his petition for coram nobis (Petition, p.11). In both instances petitioner received "postal card denials".

Respondent, relying upon Conway v. Wilson, 368 F.2d 485, argues that "the California Supreme Court may not have denied the petition on the merits," (Return, p.5) citing procedural deficiencies in petitioner's statement of grounds for relief.

Respondent's position, and that of the Conway ruling, has been overruled by Harris v. Superior Court, 500 F.2d 1124, (9th Cir. 1974). Harris holds that when the California Supreme Court denies a habeas corpus petition without opinion or citation, the exhaustion requirement is satisfied. Id.,

at 1128-1129.

The Court stated "there is now no reason to suppose that a postcard denial without opinion is indicative of anything but a decision on the merits," Id., at 1128-1129. Therefore, respondent's arguments must fail, and it appears that the state courts have had an opportunity to rule on petitioner's contentions.

II

Petitioner's first and second contentions, raising issues of the trial judge's impropriety in considering facts not presented to him in open court, and petitioner's waiver of confrontation and jury rights based on information conveyed by his counsel that the judge would not have held petitioner over to answer, may be resolved together. The merits of both points have been raised and heard at the State's evidentiary hearing on petitioner's application for writ of habeas corpus. (Rep.Tr. 293, 304). Indeed, this evidentiary hearing was ordered for the very purpose of hearing the above two grounds. (Petition, pp. 4-6).

Under 28 U.S.C. §2254(d), the written findings of the state court are presumed correct, unless petitioner challenges that the fact finding procedures were unfair and that the merits of the factual dispute were not resolved.

Petitioner has not brought his objections within the purview of the §2254(d) subsection. The mere recapitulation of testimony favorable to petitioner's position, and adverse to that of the decision rendered by the Court, does not meet the burden required by the statute.

Rather, the record reflects a full, fair, and adequate hearing at which petitioner, an attorney of twenty years, ably represented himself. It also shows that the determination of the Court was made on the merits after a full

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development of the material facts. The facts found by the trial judge were those set forth in the transcript, and came from "the testimony of witnesses," "counsels' arguments," "the documents, (including). . . the moving papers for writ of habeas corpus", and the judge's own notes. (Rep.Tr. 351-352).

In short, the record as a whole does not rebut a presumption of correctness. The record fairly supports the determination of the trial judge. Selz v. State of California, 423 F.2d 702, 703 (9th Cir. 1970). No further evidentiary hearing is required under such circumstances. Townsend v. Sain, 372 U.S. 293 (1963). By federal standards, petitioner's argument also fails.

III

Petitioner's enunciation of errors, allegedly denying him a fair evidentiary hearing in state court, begins with the Court's refusal to permit him to introduce the polygraphic examination of his leading witness. The law is clear that "mere errors in the rejection of evidence are not subject to review by writ of habeas corpus." Charlton v. Kelly, 221 U.S. 447, 457 (1913). See also, Lisenba v. California, 314 U.S. 216, 228 (1941) and Rogers v. Peck, 199 U.S. 425, 434 (1905). Rather petitioner must allege an error of constitutional magnitude, which he has not done.

Furthermore, there is law in this circuit to the effect that there is no abuse of the trial court's discretion in rejecting the introduction of polygraph evidence. Polakoff v. United States, 489 F.2d 725, 727 (C.D. Cal, 1974). Rejection of such evidence has been justified where it appeared that the trial judge would not have believed the witness irrespective of the polygraph test, United States v. Bentham, 470 F.2d 1367, 1368 (9th Cir. 1972), or where "the amount of reliance upon them would not overcome the conclusions reached upon hearing

conflicting evidence." Esso Transport Company, Inc. v. Terminales Maracaibo, 356 F.Supp. 1363, 1367 (9th Cir. 1973). Finally, this jurisdiction has stated, "the error, if any, in rejecting the evidence would be harmless under Rule 52(g), FRCP." United States v. Bentham, supra, 1368.

In sum, petitioner's allegation of a mere evidentiary issue a denialof which has consistently been treated by this circuit as a matter within the trial court's discretion, must fail.

Petitioner secondly argues that he was unconstitutionally prohibited from producing the testimony of his two co-conspirators, who would have testified to his innocence. At the evidentiary hearing petitioner contended the two witnesses would have testified to petitioner's state of mind at the time the case was submitted on the preliminary hearing transcript. (Rep. Tr. pp.93-100). The above issue had already been addressed in the testimony of three of petitioner's witnesses. (Rep. Tr. 17-18; 45-50; 104-106). Although petitioner denies the evidence he sought to introduce "would be more than cumulative" (Traverse, p.14) petitioner does not substantiate this argument. He articulates no new and material evidence not previously raised, nor does he argue that he was "prejudiced by a failure of any particular witness to take the stand." Bryant v. Cox, 312 F.Supp. 218 (W.D. Pa. 1970).

In short, petitioner has again raised "a question of the propriety of the trial judge's action in the admission of evidence", Lisenba v. California, supra, at 228, over which this Court exercises no review. Petitioner makes an inadequate showing in constitutional dimensions as to the nature of the profered evidence. Thus, this contention also lacks merit.

. . . .

AP-4-5

Petitioner's third contention is that misconduct on the part of the deputy district attorney denied him the right to a fair evidentiary hearing.

The conduct to which petitioner objects concerns the prosecutor asking petitioner's character witness on cross-examination if he would have changed his opinion as to petitioner's truth and veracity if he had known that petitioner was selling babies illegally (Rep.Tr. 194-195). Petitioner objected, and the Court asked the prosecutor if he had any basis for the question. The district attorney first expressed his willingness to "bring that basis to the Court" through witnesses (Rep.Tr. 195) but later decided to withdraw the question "because I don't want to inconvenience people." (Rep. Tr. 196). The deputy district attorney later apologized to petitioner, admitting he knew better than to ask questions that he was not prepared nor willing to prove. Petitioner seemed to accept the apology. (Rep.Tr. 201).

Respondent correctly cites Lisenba v. California, supra, for the holding that "the Fourteenth Amendment leaves California free to adopt a rule of relevance" of collateral criminal conduct on the part of the accused. Lisenba, supra, at 236. Yet state law also holds that "such cross-examination (impeachment of character) must be conducted in good faith . . . 'An interrogator, in order to avoid a charge of misconduct, must be prepared to follow up with proof' questions if the existence of harmful facts should be denied." People v. Perez, 58 Cal.2d 229, 238-239 (1962).

The instant prosecutor, who admitted, "Unless I was prepared to go forward at the time I asked the question, which I am obviously admitting I am not inclined to do at this time, I should never (have)mentioned it," (Rep.Tr. 201) manifestly demonstrated conduct falling far short of the "good faith"

required of him.

The question remains: did prosecutorial misconduct deny petitioner's due process rights? Guideline toward resolving the question is set forth in Lisenba v. California, supra, at 236.

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial . . . . "

It cannot be said that the prosecutor's admittedly improper question fatally infected petitioner's trial, for the trial judge "could be trusted to decide the guilt or innocence upon the factual basis of the charge." Brown v. United States, 222 F.2d 293, 298 (9th Cir. 1955). As declared in Iva Ikuko Toguri D'Aguino v. United States, 192 F.2d 338, 367 (9th Cir. 1951):

> "Our system of jurisprudence properly makes it a matter primarily for the direction of the trial court to determine whether prejudicial misconduct has occurred. An appellate court will not review the exercise of the trial court's discretion in such a matter unless the misconduct and prejudice is so clear that it can be said that the trial court judge has been guilty of an abuse of discretion."

Thus, although petitioner has demonstrated an instance of prosecutorial misconduct, he has not shown that this incident "fatally infected" his trial so as to deny "fundamental fairness" Lisenba v. California, supra. Nor has he shown that the Court did not judiciously ignore the question and proceed on anything

but "the factual basis of the charge." Brown v. United States, supra. Therefore, petitioner's third contention must also fail.

Petitioner's fourth contention is that the Court erroneously denied his motion to take depositions of several witnesses. The Court did so on the ground that since habeas corpus is in the same nature as criminal proceedings, it did not have the power to order depositions taken unless the requirements of California Penal Code §1335, et seq. were met. (Petition, Exhibit F, pp. 18-21).

Clearly, the issue presented is one of state procedure. Like matters concerning the admissibility of evidence, state procedures are not the subject of habeas corpus review. Incorporating the text and authorities of this memorandum as to petitioner's first and second alleged errors at the evidentiary hearing, it appears clear that petitioner has again failed to present a federal question for which habeas corpus relief may issue.

Petitioner's final argument is that the state judge who conducted the evidentiary hearing should have disqualified himself because of bias. Petitioner cites no supporting facts whatsoever for this legal ground.

As indicated, since the petition was originally filed with counsel, petitioner was exempted from the requirement of using the petition form supplied by the Central District of California. Petitioner was not exempted from compliance with Local Rule 19. Subsection (a)(5)(b) of Rule 19 provides that a petition set forth "in concise form, the grounds upon which petitioner bases his allegation that he is being held in custody unlawfully, (and) the facts which support each of these grounds. . . . "

Af-4-i

Petitioner's utter failure to comply with the particularity required by Local Rule 19 renders his final contention without merit. See also, Boehme v. Maxwell, 423 F.2d 1056 (9th Cir. 1974).

From the preceding analysis of petitioner's contentions, it is apparent that petitioner's grounds for evidentiary hearing or issuance of the writ are insubstantial. The state court trier of facts has reliably found the relevant facts to be without error of constitutional magnitude. By federal standards petitioner received a fair hearing and fair trial. Further hearing is neither necessary nor appropriate. Petitioner has not met the burden of showing that he is being held in violation of the Constitution or laws of the United States.

The Magistrate recommends that petitioner's application for writ of habeas corpus be denied.

DATED: March 24, 1975

VENETTA S. TASSOPULOS
United States Magistrate

CHAPTER 2
POWERS AND DUTIES OF JUDGES AT CHAMBERS AND ELSEWHERE

§163. Supreme Court Judges and Judges of Courts of Appeal.

The justices of the Supreme Court and of the courts of appeal, or any of them, may, at chambers, grant all orders and writs which are usually granted in the first instance upon an ex parte application, except writs of mandamus, certiorari, and prohibition; and may, in their discretion, hear applications to discharge such orders and writs.

Leg.H. 1872, 1880 p. 41, 1935 ch. 74, 1967 ch. 17.

§166. Superior Court Judges.

The judge or judges of the superior, municipal and justice courts may, at chambers, in the matters within the jurisdiction of their respective courts:

1. Grant all orders and writs which are usually granted in the first instance upon an ex parte application, and may, at chambers, hear and dispose of such orders and writs; and may also, at chambers, appoint appraisers, receive inventories and accounts to be filed, suspend the powers of executors, administrators, or guardians in the cases allowed by law, grant special letters of administration or guardianship, approve claims and bonds, and direct the issuance from the court of all writs and process necessary in the exercise of their powers in matters of probate;

2. Hear and determine all motions made pursuant to Sections 657 or 663 of this code;

3. Hear and determine all uncontested actions, proceedings, demurrers, motions, petitions, applications, and other matters pending before the court other than actions for divorce, maintenance or annulment of marriage, and except also applications for confirmation of sale of real property in probate proceedings.

A judge may, out of court, anywhere in the State, exercise all the powers and perform all the functions and duties conferred upon a judge as contradistinguished from the court, or which a judge may exercise or perform at chambers.

Leg.H. 1872, 1880 p. 41, 1929 p. 850, 1933 ch. 743, 1951 ch. 1737.

§167. Enacted 1929. Repealed 1933 ch. 743.

A new §167 follows.

§167. Judges in Courts Having No Clerk.

Any act required or permitted to be performed by the clerk of a court may be performed by a judge thereof, and shall be performed by a judge in any court having no clerk.

Leg.H. 1969 ch. 1610.

CHAPTER 3
DISQUALIFICATION OF JUDGES

§170. Interest, Relationship, Bias or Prejudice.

No justice or judge shall sit or act as such in any action or proceeding:

1. To which he is a party; or in which he is interested other than as a holder or owner of any capital stock of a corporation, or of any bond, note or other security issued by a corporation;

2. In which he is interested as a holder or owner of any capital stock of a corporation, or of any bond, note or other security issued by a corporation;

3. When he is related to either party, or to an officer of a corporation, which is a

party, or to an attorney, counsel, or agent of either party, by consanguinity or affinity within the third degree computed according to the rules of law, or when he is indebted, through money borrowed as a loan, to either party, or to an attorney, counsel or partner of either party, or when he is so indebted to an officer of a corporation or unincorporated association which is a party; provided, however, that if the parties appearing in the action and not then in default, or the petitioner in any probate proceeding, or the executor, or administrator of the estate, or the guardian of the minor or incompetent person, or the commissioner, or the referee, or the attorney for any of the above named, or the party or his attorney in all other or special proceedings, shall sign and file in the action or matter, a stipulation in writing waiving the disqualification mentioned in this subdivision or in [1] Subdivision 2 or 4 hereof, the judge or court may proceed with the trial or hearing and the performance of all other duties connected therewith with the same legal effect as if no such disqualification existed;

4. When, in the action or proceeding, or in any previous action or proceeding involving any of the same issues, he has been attorney or counsel for any party; or when he has given advice to any party upon any matter involved in the action or proceeding; or when he has been retained or employed as attorney or counsel for any party within two years prior to the commencement of the action or proceeding;

5. When it is made to appear probable that, by reason of bias or prejudice of such justice or judge a fair and impartial trial cannot be had before him.

Whenever a judge or justice shall have knowledge of any fact or facts, which, under the provisions of this section, disqualify him to sit or act as such in any action or proceeding pending before him, it shall be his duty to declare the same in open court and cause a memorandum thereof to be entered in the minutes or docket. It shall thereupon be the duty of the clerk, or the judge if there be no clerk, to transmit forthwith a copy of such memorandum to each party, or his attorney, who shall have appeared in such action or proceeding, except such party or parties as shall be present in person or by attorney when the declaration shall be made.

In justice courts when, before the trial, either party makes and files an affidavit that he believes that he cannot have a fair and impartial trial before the judge before which the action is pending, by reason of the interest, prejudice or bias of the judge, the court may order the transfer of the action, and the provisions of Section 398 shall apply to such transfer.

Whenever a judge of a court of record who shall be disqualified under the provisions of this section, to sit or act as such in any action or proceeding pending before him, neglects or fails to declare his disqualification in the manner hereinbefore provided, any party to such action or proceeding who has appeared therein may present to the court and file with the clerk a written statement objecting to the hearing of such matter or the trial of any issue of fact or law in such action or proceeding before such judge, and setting forth the fact or facts constituting the ground of the disqualification of such judge. Copies of such written statement shall forthwith be served by the presenting party on each party, or his attorney, who has appeared in the action or proceeding and on the judge alleged in such statement to be disqualified.

Within 10 days after the filing of any such statement, or 10 days after the service of such statement as above provided, whichever is later in time, the judge alleged therein to be disqualified may file with the clerk his consent in writing that the action or proceeding be tried before another judge, or may file with the clerk his written answer admitting or denying any or all of the allegations contained in such statement and setting forth any additional fact or facts material or relevant to the question of his disqualifications. The clerk shall forthwith transmit a copy of the judge's consent or answer to each party or his attorney who shall have appeared in such action or proceeding. Every such statement and every such an-

swer shall be verified by oath in the manner prescribed by Section 446 for the verification of pleadings. The statement of a party objecting to the judge on the ground of his disqualification, shall be presented at the earliest practicable opportunity, after his appearance and discovery of the facts constituting the ground of the judge's disqualification, and in any event before the commencement of the hearing of any issue of fact in the action or proceeding before such judge.

No judge of a court of record, who shall deny his disqualification, shall hear or pass upon the question of his own disqualification; but in every such case, the question of the judge's disqualification shall be heard and determined by some other judge agreed upon by the parties who shall have appeared in the action or proceeding, or, in the event of their failing to agree, by a judge assigned to act by the Chairman of the Judicial Council, and, if the parties fail to agree upon a judge to determine the question of the disqualification, within five days after the expiration of the time allowed herein for the judge to answer, it shall be the duty of the clerk then to notify the Chairman of the Judicial Council of that fact; and it shall be the duty of the Chairman of the Judicial Council forthwith, upon receipt of notice from the clerk, to assign some other judge, not disqualified, to hear and determine the question.

If such judge admits his disqualification, or files his written consent that the action or proceeding be tried before another judge, or fails to file his answer within the [2] 10 days herein allowed, or if it shall be determined after hearing that he is disqualified, the action or proceeding shall be heard and determined by another judge or justice not disqualified, who shall be agreed upon by the parties, or, in the event of their failing to agree, assigned by the Chairman of the Judicial Council; provided, however, that when there are two or more judges of the same court, one of whom is disqualified, the action or proceeding may be transferred to a judge who is not disqualified.

A judge who is disqualified may, notwithstanding his disqualification, request another judge, who has been agreed upon by the parties, to sit and act in his place.

6. In an action or proceeding brought in any court by or against the Reclamation Board of the State of California, or any irrigation, reclamation, levee, swampland or drainage district, or trustee, officer or employee thereof, affecting or relating to any real property, or an easement or right-of-way, levee, embankment, canal, or any work provided for or approved by the Reclamation Board of the State of California, a judge of the superior court of the county, or a judge of the municipal court or justice court of the judicial district, in which such real property, or any part thereof, or such easement or right-of-way, levee, embankment, canal or work, or any part thereof is situated shall be disqualified to sit or act, and such action shall be heard and tried by some other judge assigned to sit therein by the Chairman of the Judicial Council, unless the parties to the action shall sign and file in the action or proceeding a stipulation in writing, waiving the disqualification in this subdivision of this section provided, in which case such judge may proceed with the trial or hearing with the same legal effect as if no such legal disqualification existed. If, however, the parties to the action shall sign and file a stipulation, agreeing upon some other judge to sit or act in place of the judge disqualified under the provisions of this subdivision, the judge agreed upon shall be called by the judge so disqualified to hear and try such action or proceeding; provided, that nothing herein contained shall be construed as preventing the judge of the superior court of such county, or of the municipal court of such judicial district, from issuing a temporary injunction or restraining order, which shall, if granted, remain in force until vacated or modified by the judge designated as herein provided.

7. When, as a judge of a court of record, by reason of permanent or temporary physical impairment, he is unable to properly perceive the evidence or properly conduct the proceedings.

8. Notwithstanding anything contained in subdivision 6 of this section, a judge of the superior court or a judge of the municipal court or justice court of the judicial district, in which any real property is located, shall not be disqualified to hear or determine any matter in which the opposing party shall have failed to appear within the time allowed by law, or as to such of the opposing parties who shall have failed to appear within the time allowed by law, and as to which matter or parties the same shall constitute purely a default hearing; provided, that nothing in this section contained shall be construed as preventing the judge of the superior court of such county, or of the municipal court of such judicial district, from issuing an order for immediate possession in proceedings in eminent domain.

Nothing in this section contained shall affect a party's right to a change of the place of trial in the cases provided for in Title 4 (commencing with Section 392) of Part 2 of this code.

Leg.H. 1872, 1880 p. 42, 1893 p. 234, 1897 p. 287, 1905 p. 467, 1915 p. 530, 1921 p. 150, 1925 p. 18, 1927 p. 1403, 1929 p. 958, 1933 ch. 743, 1937 ch. 136, 1939 ch. 1047, 1941 ch. 70, 1951 ch. 1737, 1957 ch. 1545, 1959 ch. 744, 1965 ch. 1260, 1969 ch. 446, 1971 ch. 807.

§170. **1971 Deletes.** 1. subdivisions 2. five

§170a. Disqualified on Appeal When Participating in Trial.

No justice or judge, before whom a cause or question may have been tried or heard, shall sit or act, in an appellate tribunal, on the trial or hearing of such cause or question.

Leg.H. 1919 p. 454, 1951 ch. 1737.

§170b. Enacted 1931. Repealed 1933 ch. 743.

§170.1. Husband and Wife—One Degree of Affinity.

For the purpose of computing the degrees of affinity within the meaning of Section 170, there is one degree of affinity between husband and wife.

Leg.H. 1945 ch. 960.

§170.5. Enacted 1937. Repealed 1959 ch. 1099.

§170.6. Prejudice Against Party or Attorney.

(1) No judge or court commissioner of any superior, municipal or justice court of the State of California shall try any civil or criminal action or special proceeding of any kind or character nor hear any matter therein which involves a contested issue of law or fact when it shall be established as hereinafter provided that such judge or court commissioner is prejudiced against any party or attorney or the interest of any party or attorney appearing in such action or proceeding.

(2) Any party to or any attorney appearing in any such action or proceeding may establish such prejudice by an oral or written motion without notice supported by affidavit or declaration under penalty of perjury or any oral statement under oath that the judge or court commissioner before whom such action or proceeding is pending or to whom it is assigned is prejudiced against any such party or attorney or the interest of such party or attorney so that such party or attorney cannot or believes that he cannot have a fair and impartial trial or hearing before such judge or court commissioner. Where the judge or court commissioner assigned to or who is scheduled to try the cause or hear the matter is known at least 10 days before the date set for trial or hearing, the motion shall be made at least five days before that date. If directed to the trial of a cause where there is a master calendar, the motion shall be made to the judge supervising the master calendar not later than the time the cause is assigned for trial. In no event shall any judge or court commissioner entertain such motion if it be made after the drawing of the name of the first juror, or if there be no jury, after the making of an opening statement by counsel for plaintiff, or if there be no such statement, then after swearing in the first witness or the giving of any evi-

dence or after trial of the cause has otherwise commenced. If the motion is directed to a hearing (other than the trial of a cause), the motion must be made not later than the commencement of the hearing. In the case of trials or hearings not herein specifically provided for, the procedure herein specified shall be followed as nearly as may be. The fact that a judge or court commissioner has presided at or acted in connection with a pretrial conference or other hearing, proceeding or motion prior to trial and not involving a determination of contested fact issues relating to the merits shall not preclude the later making of the motion provided for herein at the time and in the manner hereinbefore provided.

(3) If such motion is duly presented and such affidavit or declaration under penalty of perjury is duly filed or such oral statement under oath is duly made, thereupon and without any further act or proof, the judge supervising the master calendar, if any, shall assign some other judge or court commissioner to try the cause or hear the matter. In other cases, the trial of the cause or the hearing of the matter shall be assigned or transferred to another judge or court commissioner of the court in which the trial or matter is pending or, if there is no other judge or court commissioner of the court in which the trial or matter is pending, the Chairman of the Judicial Council shall assign some other judge or court commissioner to try such cause or hear such matter as promptly as possible. Under no circumstances shall a party or attorney be permitted to make more than one such motion in any one action or special proceeding pursuant to this section; and in actions or special proceedings where there may be more than one plaintiff or similar party or more than one defendant or similar party appearing in the action or special proceeding, only one motion for each side may be made in any one action or special proceeding.

(4) Unless required for the convenience of the court or unless good cause is shown, a continuance of the trial or hearing shall not be granted by reason of the making of a motion under this section. If a continuance is granted, the cause or matter shall be continued from day to day or for other limited periods upon the trial or other calendar and shall be reassigned or transferred for trial or hearing as promptly as possible.

(5) Any affidavit filed pursuant to this section shall be in substantially the following form:

(Here set forth court and cause)

State of California)
) ss.
County of)

, being first duly sworn, deposes and says: That he is a party (or attorney for a party) to the within action (or special proceeding). That , the judge or court commissioner before whom the trial of the (or a hearing in the) aforesaid action (or special proceeding) is pending (or to whom it is assigned), is prejudiced against the party (or his attorney) or the interest of the party (or his attorney) so that affiant cannot or believes that he cannot have a fair and impartial trial or hearing before such judge or court commissioner.

Subscribed and sworn to before me this day of , 19 .

Clerk or Notary Public or other officer administering oath.

(6) Any oral statement under oath or declaration under penalty of perjury made pursuant to this section shall include substantially the same contents as the affidavit above.

(7) Nothing in this section shall affect or limit the provisions of Section 170 and Title 4, Part 2, of this code and this section shall be construed as cumulative thereto.

(8) If any provision of this section or the application to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the section which can be given effect without the invalid provision or application and to this end the provisions of this section are declared to be severable.

Leg.H. 1957 ch. 1055, 1959 ch. 640, 1961 ch. 526, 1965 ch. 1442, 1967 ch. 1602.

§170.7. Appellate Department of Superior Court Exempt From §170.6.

Section 170.6 does not apply to a judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

Case No. CV 74-1636 MML (T) Date 8-26-75

Title RONALD R. SILVERTON -Vs- CALIFORNIA ADULT AUTHORITY

DOCKET ENTRY

PRESENT:

HON. VENETTA S. TASSOPULOS

Peggy Moore
Deputy Clerk

Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

NONE

ATTORNEYS PRESENT FOR DEFENDANTS:

None

PROCEEDINGS: "In Chambers"

The Magistrate having been advised of an error and omission in the Order Denying Application for Certificate of Probable Cause, it is ordered that the words "in forma pauperis" shall be deemed deleted from line 29 thereof.

It is further ordered that the Report and Recommendation of the Magistrate referred to therein be attached to the order denying application for Certificate of Probable Cause, and be mailed to all parties of record.

MINUTES FORM 11

Initials of Deputy Clerk PM

AC-7